

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. King, if you will call
4 the case, please.

5 THE CLERK: Court calls Case No.
6 6:10cv329, AdjustaCam, LLC v. Amazon.com, Inc., et al.

7 THE COURT: All right. Announcements.

8 MR. SPANGLER: Your Honor, good
9 afternoon. Andrew Spangler on behalf of the plaintiff.
10 With me today is Ms. Erica Barnes, Mr.
11 John Edmonds, and Mr. Shea Padivan.

12 Mr. Edmonds will be presenting oral
13 arguments.

14 THE COURT: Okay. Thank you.

15 MR. YARBROUGH: Your Honor, John Zarian
16 and Trey Yarbrough on behalf of Newegg and Rosewill.

17 Mr. Zarian will be presenting our
18 argument.

19 THE COURT: Okay. Thank you.

20 MR. SUTTON: Your Honor. Ezra Sutton on
21 behalf of Sakar International. I will be presenting
22 arguments on behalf of Sakar.

23 THE COURT: All right. Very well. Thank
24 you.

25 Well, we are here on AdjustaCam's,

1 Newegg's, and Rosewill's motion for declaration of
2 exceptional case and award of fees and non-taxable
3 expenses, Docket No. 727. And the other motion on
4 behalf of Sakar's -- similar motion, Docket No. 746.

5 So you may proceed with presenting the
6 motion with -- whichever one of you would like to go
7 first.

8 MR. ZARIAN: Thank you, Your Honor.

9 Your Honor, as the Court knows, this is a
10 motion brought pursuant to Section 285 which allows fees
11 to be awarded under circumstances which include
12 vexatious or unjustified litigation or like infractions.

13 As evidenced by the papers, Your Honor,
14 and the record on file with the Court, this is such a
15 case. And it is such a case based on a combination of
16 factors, including, Your Honor, a pattern of nuisance
17 value settlements obtained and extracted over the course
18 of this litigation all while claims stood rejected and
19 then were finally cancelled once these settlements had
20 been extracted pursuant to patent reexamination
21 proceedings before the USPTO.

22 There is also, Your Honor, a relentless
23 effort throughout this course of the litigation by the
24 plaintiff to press what was clearly now and certainly
25 was clearly after claim construction, an entirely

1 baseless and unmeritorious infringement position.

2 THE COURT: Is it your position that this
3 case became vexatious, as you said, after claim
4 construction; or that it was already so from the moment
5 that it was filed?

6 MR. ZARIAN: We believe it clearly was
7 after claim construction; but it was also, for the same
8 reasons, before. We think those were the positions that
9 had been implicit and their invalidity arguments made
10 before the PTO which called into question the very
11 validity of the patent; but certainly as to infringement
12 after claim construction, Your Honor, we submit the
13 position adopted by the plaintiff in this case was
14 clearly baseless.

15 THE COURT: Okay. Do you believe that
16 infringement was clearly baseless prior to claim
17 construction?

18 MR. ZARIAN: Not as a matter of law, Your
19 Honor. The claim construction was still pending. We
20 believe that the claim construction could and should
21 have been anticipated in part on its material points.
22 But, Your Honor, I think the focus of our argument is
23 clearly after claim construction this case was indeed
24 baseless on infringement.

25 THE COURT: And are you seeking

1 attorneys' fees only after claim construction or
2 attorneys' fees prior to claim construction?

3 MR. ZARIAN: Both, Your Honor. And a
4 majority of the fees were incurred post-Markman. I
5 think more than half.

6 THE COURT: Were incurred when?

7 MR. ZARIAN: After the Markman ruling.
8 Much of the work was done at the end, including expert
9 discovery and the like.

10 However, Your Honor, even prior to that
11 we believe that the pattern of nuisance value
12 settlements that were being extracted, existed. And for
13 that reason we would seek -- including that reason, we
14 would seek attorneys' fees for the prior period of time
15 as well.

16 The record shows, Your Honor, that the
17 demands made of Newegg in particular -- and we cite
18 these only for the purposes of this motion and seek to
19 disclose no more about mediation or settlement
20 discussions than is warranted -- demands were made in
21 the amount of 75,000 and then 65,000 and 51,000 dollars.
22 And ultimately this case was voluntarily dismissed for
23 zero dollars.

24 Plaintiff's own damages expert opined
25 that the royalty rate implicit in the \$75,000 demand was

1 clearly unreasonable. And it was. The damages here
2 chalked up by plaintiff's expert as to Newegg were
3 \$17,000 at the end of the day.

4 And, Your Honor, the pattern by which
5 these settlements were obtained I think is instructive
6 and the amount of the settlements too. This is, in
7 effect, very much like the Eon case. And defendants
8 were concerned from the very outset of this litigation
9 that what we are facing with the large number of
10 defendants sued and the nominal demands being made, that
11 what we had here, in fact, was another pattern of
12 extracting nuisance value settlements on weak and
13 virtually baseless claims. And that is what transpired.

14 Hewlett-Packard was one of the last of
15 the defendants to settle. They had almost \$29 million
16 in revenue --

17 THE COURT: Who is this?

18 MR. ZARIAN: Hewlett-Packard, HP, Your
19 Honor. Almost \$29 million in revenue according to
20 plaintiff's own expert and settled for \$25,000.
21 Ostensibly, Newegg was dismissed to clear the field for
22 Sakar, which is also in court today; and to allow focus
23 on a more significant -- I think as the papers put it --
24 defendant.

25 Well, within days or weeks of the Newegg

1 dismissal, this plaintiff was also seeking to dismiss
2 Sakar and ultimately dismissed Sakar for zero dollars.

3 Gear Head settled for \$66,000.

4 In fact, 20 or more defendants settled
5 for less than \$100,000.

6 And contrary to the argument that has
7 been made in the papers, there is no evidence of a
8 pattern -- an established royalty or pattern of seeking
9 some target royalty.

10 In fact, for the 15 defendants who
11 settled, as to which our expert was able to derive an
12 imputed royalty based on sales, those royalties, Your
13 Honor, were all over map, ranging from several
14 dollars to just a few cents. And not one is within the
15 target range, allegedly, that was the focus of these
16 settlements.

17 What we have, in fact, Your Honor was a
18 pattern of extracting litigation nuisance value and no
19 more. There was no pattern of settlements or royalty
20 agreements having been reached, absent litigation. In
21 each case a suit was filed and nuisance value was
22 extracted based on the pendency of a lawsuit. That is
23 exactly what happened with respect to Newegg, Your
24 Honor.

25 Your Honor, the infringement position as

1 it developed is also instructive and, again, clearly
2 baseless, as we have argued in our papers.

3 The ball-and-socket joint that is
4 featured in substantially all of Newegg's and Rosewill's
5 cameras, these are products that do not include a camera
6 limited to a single axis of rotation.

7 Now, the fiction to which plaintiff
8 adhered for some time in this case is that somehow that
9 single ball-and-socket joint was really two joints
10 somehow working together along a single axis of rotation
11 and another single axis of rotation allowing multiple
12 axes of rotation. That position could never hold water,
13 and yet it was the position that was adhered to
14 throughout this case.

15 It was only at the very deposition of the
16 technical expert for plaintiff in this case, that a new
17 theory was charted out, never seriously advanced, but at
18 that point Dr. Muskivitch tried to move to a hinge
19 member -- move the hinge member from the ball and stem
20 to the top half of the clip to somehow separate out the
21 second half of the clip and call that the support frame
22 to identify two new axes of rotation. It was a dramatic
23 change. This disclosed on August 24th, Your Honor,
24 2012.

25 Now, that was after the original report

1 had been produced by Dr. Muskivitch, after a rebuttal
2 report had been produced by Newegg's expert, after that
3 expert had been deposed on that rebuttal report, and
4 after all of the preparation for the deposition of Dr.
5 Muskivitch. And it was only at that very deposition on
6 that proceeding that a new report came out of his
7 attorney's -- plaintiff's counsel's briefcase and was
8 produced with a dramatically different position.

9 We submit, Your Honor, in effect,
10 conceding that the original position that was advanced
11 and relentlessly pursued throughout the litigation was
12 baseless. It never had merit, and clearly didn't have
13 merit after the claim construction ruling in this case.

14 Your Honor, the pattern in this case of
15 extracting nuisance value settlements, again, in the
16 teeth of proceedings before the PTO in reexamination
17 that resulted inextricably in cancellation while
18 advancing a baseless infringement position, we submit is
19 exactly the very type of case for which Section 285 was
20 devised.

21 This is a case which featured unjustified
22 litigation that from the very beginning appeared to all
23 accounts and certainly in hindsight, clearly, clearly
24 and convincingly shows a vexatious and unjustified
25 litigation; and it shows a pattern of infractions, Your

1 Honor, for which 285 affords a remedy. And we ask the
2 Court to grant that remedy to Newegg and Rosewill in
3 this case.

4 THE COURT: You mentioned these nuisance
5 value settlements. Have you discovered all of the
6 settlements in this case?

7 MR. ZARIAN: We have, Your Honor. They
8 are summarized in our moving papers. There were only
9 two that were in excess of \$100,000. And all of the
10 rest -- it is either 20 or 22 I believe, including the
11 last with Gear Head and HP were a hundred thousand
12 dollars or significantly less.

13 Now, it is interesting that a handful of
14 these show -- or purport to show a running royalty of
15 something more beyond certain thresholds.

16 As our expert has indicated, and this is
17 in the record, there is absolutely no evidence, in fact
18 it would appear that those thresholds were never
19 triggered, and that any higher running royalty of a
20 dollar or 1.25 or 1.50 was never paid by anybody.

21 That, I don't think is undisputed in the
22 sense of no evidence being in the record reflecting any
23 such payments being made. We would submit that the
24 inference is there that this may well have been what we
25 might characterize as window-dressing on a settlement

1 that featured a lump sum that covered clearly all of the
2 expected sales or known sales; and that these thresholds
3 were set at a point where that running royalty would
4 never be had; in fact, was never had.

5 Your Honor, I think Sakar's Counsel has a
6 couple of other points to raise. Unless the Court has
7 any further questions, I would rest at this point and
8 reserve for any reply.

9 THE COURT: Okay. Thank you.
10 Counsel.

11 MR. SUTTON: Your Honor, I am here
12 representing Sakar International who sold some of these
13 units to a few of their customers such as Kohl's and
14 Fry's. They are retailers, Kohl's and Fry's.

15 And I was criticized in my papers for
16 asking for legal -- attorneys' fees for defending Kohl's
17 and Fry's.

18 THE COURT: Now, tell me who you
19 represent.

20 MR. SUTTON: I represent Sakar
21 International who imported these units -- which I am
22 going to talk about -- and they were sold to a number of
23 retailers, and we had to indemnify some of those
24 retailers, such Kohl's department stores and Fry's
25 Electronics.

1 And in the course of the two- or
2 three-year litigation we incurred legal fees in
3 defending the other -- in addition to defending Sakar,
4 which is my primary client, Sakar was asked to defend
5 and indemnify the other defendants which I just
6 mentioned, Kohl's department stores and Fry's
7 Electronics.

8 THE COURT: Did Kohl's and Fry's, did
9 they settle?

10 MR. SUTTON: We all settled together, I
11 would say.

12 THE COURT: All right.

13 MR. SUTTON: What happened -- just to
14 finish that point, Your Honor, we had to do
15 interrogatories, document requests, depositions, you
16 know, general discovery, and motions for Kohl's and
17 Fry's.

18 So if the Court decides that the
19 defendants are entitled to attorneys' fees in this case,
20 I wanted to answer the criticism I received in the
21 papers that why are we asking -- you know, we have no
22 right to ask for the legal fees for -- that we spent on
23 Kohl's and Fry's; and I just wanted to explain to the
24 Court at the outset that we were representing all three
25 of those defendants, Sakar who sold it to Kohl's and

1 Fry's. And if --

2 THE COURT: Are you making this motion on
3 behalf of Sakar or Sakar, Kohl's, and Fry's?

4 MR. SUTTON: The motion is on behalf of
5 Sakar International because I sent my invoices -- when I
6 was doing work for Kohl's and Fry's, I would send my
7 invoice to Sakar, my client. Sakar was the importer and
8 wholesaler of these items and sold them to Kohl's and
9 Fry's. So Kohl's as the customer and Fry's as the
10 customer, under the UCC asked for indemnification by
11 Sakar.

12 So my invoices went -- my invoice for all
13 three defendants went to Sakar. Sakar paid those
14 invoices to me and, therefore, I think we are in our
15 right to ask for -- if there is going to be a
16 reimbursement of any legal fees, I think we are in our
17 right to include the legal expenses that we incurred in
18 representing Kohl's and Fry's because Sakar paid for
19 those legal expenses.

20 THE COURT: Now, what is Sakar's status
21 as a party? Have you settled or have you been
22 dismissed?

23 MR. SUTTON: Well, Your Honor, we were --
24 we had to negotiate an ending to the case. What
25 happened is the plaintiff gave up their fight in the

1 Patent Office in September of 2012. With regard to the
2 reexamining of claims, they were rejected three times,
3 and they finally gave up in September 2012. And shortly
4 thereafter they dropped and abandoned their claims in
5 the Patent Office during the reexamination proceeding.

6 So at that moment in time there was no
7 longer any infringement claim because the patent was --
8 the claims were essentially gone. So at that point in
9 time we spent a few months negotiating a settlement
10 and -- which included, you know, what Sakar could do in
11 the future with regard to what they can and cannot sell.

12 We resolved that issue; and then
13 eventually there was a motion to dismiss, which Your
14 Honor granted.

15 THE COURT: A motion to dismiss by
16 agreement, right?

17 MR. SUTTON: Correct.

18 THE COURT: But did you pay any
19 compensation?

20 MR. SUTTON: No, no. No, we did not pay
21 any compensation because what happened was, Your Honor,
22 there were originally about 25 defendants in this case.
23 And as was pointed out to Your Honor a few minutes ago,
24 about 22 out of the 25 settled during the course of the
25 litigation. And two defendants did not settle and pay

1 money, which is Sakar and --

2 THE COURT: Newegg.

3 MR. SUTTON: Newegg.

4 THE COURT: And what happened to Kohl's
5 and Fry's?

6 MR. SUTTON: They got -- to the best of
7 my recollection, they were also dismissed. So Sakar and
8 its customers were dismissed from the case.

9 THE COURT: As part of the settlement
10 with Sakar?

11 MR. SUTTON: As part of the dismissal. I
12 think it was basically a stipulation of dismissal with
13 certain terms in there about what could be done in the
14 future. And so everybody was dismissed. And the only
15 thing we did was we reserved our right for legal fees.

16 THE COURT: Did you represent Kohl's and
17 Fry's in the litigation?

18 MR. SUTTON: Yes, Your Honor. That is
19 what I was saying.

20 THE COURT: Are Kohl's and Fry's moving
21 for attorneys' fees on their own behalf?

22 MR. SUTTON: No, because they didn't pay
23 the legal fees.

24 THE COURT: Well -- okay.

25 MR. SUTTON: In other words, we

1 indemnified them and we represented them. Sakar --
2 these were their customers, so Sakar paid the legal fees
3 to represent them. So Sakar incurred legal fees for
4 Kohl's and for Fry's, incurred those legal fees, you
5 know, through my office.

6 THE COURT: But in order for you to
7 recover attorneys' fees as to Kohl's and Fry's, don't
8 you have to establish that this was an exceptional case
9 as to Kohl's and Fry's, not just to Sakar?

10 MR. SUTTON: Well, Your Honor, the facts
11 that I am going to go through now which relate
12 primarily -- I'm going to discuss the product in
13 question, the facts that I am going to tell the Court
14 about, are basically the same facts as they relate to
15 Kohl's and Fry's because they were selling the same unit
16 and the same issues of infringement, validity, nuisance
17 value settlements; and the four issues that I am going
18 to discuss applied to all of these group of defendants
19 because they were selling basically, Your Honor, the
20 same product.

21 THE COURT: Okay. Go ahead.

22 MR. SUTTON: Okay. So we believe that
23 this case is an exceptional case, Your Honor, for any
24 one of the following four reasons or for any combination
25 of them:

1 The first reason is that the asserted
2 claims were rejected by the U.S. Patent Office in
3 Washington as being invalid. And they were rejected
4 three times based on the Irifune reference, which was
5 used in the reexamination in the Patent Office.

6 And the asserted claims are rejected
7 three times, and -- then they dropped the patent claims.
8 By that time AdjustaCam had extracted over 20
9 settlements -- about 22 I think it is -- and the
10 Examiners in the Patent Office are, we submit, objective
11 and eventually AdjustaCam --

12 THE COURT: Okay. I mean, you are
13 basically making the same argument that Newegg's
14 attorneys made. Do you have any new arguments that
15 relate specifically to your client? I understand the
16 basic facts of what is going on.

17 MR. SUTTON: Yes, Your Honor. I just
18 want to go into a little more detail because our product
19 is somewhat different --

20 THE COURT: Well, tell me about your
21 product. I would be very interested in hearing about
22 it.

23 MR. SUTTON: All right. Okay.

24 THE COURT: If you have an exemplar copy,
25 that you could pass up to me that would be helpful to

1 me, I would like to look at it.

2 MR. SUTTON: Before I get into that, just
3 let me take a moment and say I am not going to repeat
4 the arguments that my -- that the other Counsel made
5 with regard to nuisance value settlements. I am sure
6 the Court understands that.

7 Then I am also not going to repeat the
8 arguments relating to -- well, actually we do have one
9 other argument on the Rule 11 that I do have to address.
10 Let me just quickly address that.

11 As to Rule 11, in the 30(b)(6) deposition
12 of AdjustaCam, their representative was Mr. Haynes; and
13 he admitted that he did not take a number of pre-filing
14 litigation steps as set forth in Appendix C of our
15 papers -- there is a whole list of things they did not
16 do.

17 And Mr. Edmonds tried to cure this with
18 his own affidavits. And as stated by the case of Rainey
19 v. American Forest, 26 F.Supp.2d 82 District Court of
20 DC, a 1998 case, they said in that case: The eleventh
21 hour alteration by an affidavit is inconsistent with
22 Rule 30(b)(6) and is precluded by it.

23 What happened in our case is that Mr.
24 Edmonds has submitted an affidavit stating things that
25 he did prior to the litigation and -- but Mr. Haynes

1 when we took his 30(b)(6) deposition said all of those
2 things were not done, and we have listed them very much
3 in detail in an appendix attached to our brief.

4 Your Honor, you can also look at the case
5 of Eckert, E-c-k-e-r-t, v. Kemper, K-e-m-p-e-r, cited in
6 our brief which, in quotes, says: It precludes
7 wholesale changes to previous sworn testimony.

8 Thus, we submit that Mr. Edmond's
9 declaration should be precluded as part of his
10 submission in this case.

11 So that all goes to that Rule 11
12 discussions where Mr. Haynes clearly testified that he
13 didn't do anything and was not shown anything as part of
14 his pre-filing investigation under Rule 11.

15 All right. Let me go into our product
16 now, Your Honor.

17 First, I want to address invalidity
18 because I think it is important because the invalidity
19 and infringement arguments are both the reason for this
20 motion. And let me just quickly address invalidity. It
21 will take a couple of minutes, Your Honor; just a few
22 points that I wanted to get out -- they are in our
23 brief, but I just want to highlight a few points.

24 As I said a moment ago, AdjustaCam's
25 claims were rejected by the U.S. Patent Office three

1 different times based on the same Irifune -- that's
2 I-r-i-f-u-n-e -- publication and were held to be invalid
3 on each rejection. The first rejection, Your Honor, was
4 on August 12, 2011. It was based on the Irifune patent,
5 and it was rejected under 35 USC 102, which, I am sure
6 as Your Honor knows is a full anticipation of all of the
7 claims by Irifune.

8 Then on -- then they submitted an
9 argument back to the Patent Office, and then there was
10 another -- a second office action on March 8th, 2012
11 based -- where the Examiner again cited the Irifune
12 patent, relied on it again under 35 USC 102 and said,
13 again, under 102 that it fully -- the Irifune patent
14 fully met all of the claims of the patents-in-suit.
15 Then they came in -- the plaintiff came in and submitted
16 another argument arguing against Irifune for a second
17 time.

18 Then the Patent Office came back and
19 issued what they call a final rejection, a third
20 rejection; and the Examiner in the Patent Office made it
21 final. And that was on August 30, 2012. And, again, it
22 was based on Irifune for the third time; and it was
23 based on 35 USC 102, which is a full anticipation.

24 Then the next thing that happened -- that
25 was in August. The next thing that happened was in

1 September 2012, AdjustaCam finally decided to abandon
2 their claims that were pending in the US Patent Office.

3 And at that moment in time in
4 September -- by the time of September 2012, Your Honor,
5 I think there were just two of us left in the case. All
6 of the other defendants had left.

7 And AdjustaCam's own expert, Dr.
8 Muskivitch, agreed on cross-examination that with regard
9 to the Irifune publication -- I cross-examined him, and
10 I asked him: If you loosen the screw on the top of the
11 Irifune structure and then the camera is mounted on that
12 screw, on that screw and then you rotate the screw about
13 the first vertical axis extending through the screw and
14 also the camera rotates about the second horizontal axis
15 that is in Irifune.

16 And I asked him in Mr. Muskivitch's
17 deposition at Page 316, I asked him: Does he agree that
18 that is the way that if you loosen the screw in Irifune
19 you would be able to rotate the camera about a vertical
20 axis and also rotate it about a horizontal axis, which
21 are the same two axes in the patent-in-suit? He said:
22 Basically, yes.

23 That is in deposition at Page 316.

24 Again, those are the same two axes that
25 the Court finds in the patent-in-suit. There is a

1 vertical axis through the camera that is shown in the
2 patent, and the vertical axis is numbered 26, if the
3 Court wants to look at it. And then there is a separate
4 horizontal axis 32 also shown in the specification in
5 Figure 4 of the patent-in-suit.

6 And the claims are also -- Claims 1 and
7 19, Independent Claims 1 and 19 have Paragraphs (a) and
8 (b), and Paragraph (a) is directed to the vertical axis
9 and Paragraph (b) is directed to the vertical axis.

10 Now, accordingly, AdjustaCam's actions to
11 meet the test of -- I'm sorry. AdjustaCam's actions
12 failed to meet the test of reasonable objectivity since
13 the claims were repeatedly rejected by the Patent
14 Office, three times by the Patent Office, and then
15 dropped near the end of the litigation. And also since
16 its own expert Dr. Muskivitch agreed that the Irifune
17 patent showed the same basic structure as the
18 patent-in-suit.

19 In September 2012, as I said, the
20 plaintiff, AdjustaCam, dropped the rejected claims. So
21 on this point, Your Honor, I just want to add with
22 regard to invalidity -- this is all about invalidity --
23 that AdjustaCam's strategy was to keep the '343 patent
24 alive long enough until it had extracted settlements
25 from over 22 defendants in the range of at least, I

1 believe it is over 2 million dollars.

2 This conduct and strategy should not be
3 condoned by the Court. So this is the first reason why,
4 we submit, that this was an exceptional case and we
5 are -- and that the defendants are entitled to
6 attorneys' fees.

7 Now, with regard to the infringement
8 issues, Your Honor, AdjustaCam followed a similar
9 strategy that it did with invalidity. Sakar's accused
10 camera does not meet the structure, does not meet the
11 structure -- and I am going to show this to Your
12 Honor -- does not meet the structure of Independent
13 Claims 1 and 19, including both Paragraphs (a) and (b)
14 of the claims.

15 Now, may I get a little closer to the
16 Court -- I only have one sample here, and I just want to
17 briefly explain it. Is it okay?

18 THE COURT: Yeah. Well, why don't you
19 pull out the overhead projector there.

20 Mr. Yarbrough, show him where that is.

21 And you can hold it on that, and
22 everybody can see what you are demonstrating.

23 MR. SUTTON: Okay.

24 (Pause in proceedings.)

25 THE COURT: I don't think you have it

1 working.

2 MR. YARBROUGH: There you go.

3 MR. SUTTON: Oh, over there. Okay. I
4 don't know if the Court -- it is on this screen over
5 here. Is it anywhere --

6 COURT SECURITY OFFICER: They have got it
7 everywhere.

8 MR. SUTTON: Oh, they have got it
9 everywhere, okay.

10 THE COURT: It doesn't look like that is
11 blown up quite right as far as the zoom. I think you
12 can zoom in some to get the full screen.

13 (Pause in proceedings.)

14 THE COURT: Okay. That's good -- a
15 little too far.

16 MR. SUTTON: Okay. All right. Your
17 Honor, this has two parts. Let me just -- see if I can
18 get my hands out of the way.

19 THE COURT: Back it up a little bit.
20 There. And find a good average. A little more. A
21 little more. Just a full screen.

22 MR. SUTTON: I'll make it a little
23 bigger.

24 THE COURT: That is good right there.

25 MR. SUTTON: Right there. Okay.

1 All right. Your Honor, this part that I
2 am holding is the camera, and at the bottom of it there
3 was a shaft coming out of this bottom piece which we
4 broke -- which I broke off in order to show how this
5 works.

6 So the camera sits on top of this base or
7 support frame, and there was a shaft coming out of the
8 bottom that is fixably -- I don't know if you can see
9 it -- that is fixably attached. The shaft came out of
10 here. Fixably attached to the bottom of the camera.

11 And the shaft had a ball that went into
12 this hole here. So when it was assembled it sat -- the
13 camera sat on top of the base. Let me just get it at
14 the right angle here. Set on top of the base.

15 THE COURT: Counsel, I can tell you that
16 you haven't had much experience with over --

17 MR. SUTTON: Not with a three-dimensional
18 object.

19 THE COURT: All right. I think we have
20 got -- why don't you pass it up to me and let me look at
21 it and I will see it a little better. I have trouble
22 with them, too, so don't feel too bad.

23 MR. SUTTON: Yeah, again, this is where
24 the shaft comes out of the bottom. And then it has the
25 ball --

1 THE COURT: Ball on the end of the shaft.

2 MR. SUTTON: The ball and shaft and goes
3 into the support frame.

4 THE COURT: Okay.

5 MR. SUTTON: Now, Sakar's structure does
6 not meet the limitation in Paragraph (a) of Claims 1 and
7 19. And, again, Dr. Muskivitch agreed with this in his
8 cross-examination. The reason is that Paragraph (a) of
9 Claims 1 and 19 require that the camera 12 be
10 rotatable -- and that is the key word, Your Honor, be
11 rotatable with respect to the first axis of rotation
12 relative to the hinge member 74.

13 And Figure 4 of the '343 patent actually
14 shows the structure. Your Honor, this is Paragraph 4 of
15 the patent-in-suit -- excuse me. Figure 4 of the
16 patent-in-suit. And here is the camera 12 --

17 THE COURT: Counsel, you need to speak
18 into the microphone.

19 MR. SUTTON: Oh, I'm sorry.

20 Here is the camera 12 above it, and then
21 it has the support frame, which are these two legs below
22 the camera. And then it is very difficult to see, but I
23 am going to point to two different hinges.

24 There is a vertical axis where this arrow
25 is, going through -- it has number 26 and there is a

1 vertical axis going through that member which has a
2 number 80 that I have circled. And if Your Honor can
3 see, the camera is pivoting on that part and it pivots
4 in a -- about a vertical axis.

5 So there is one pivot point in this
6 vertical axis, which is at Paragraph (a), which says a
7 first vertical axis.

8 And then there is a second axis, which is
9 this point 82 which is a horizontal axis. And you can
10 see it actually better in Figure 3. It is the axis
11 going this way, the horizontal axis. So there is a
12 pivot point for the two legs which make up the support
13 frame.

14 So you have two different axes in this
15 patent. Again, the vertical axis, which is 26 and the
16 horizontal axis which is 82.

17 And under claim construction, the Court
18 determined that the -- that each axis is a -- only has a
19 single -- only has a single axis.

20 In other words, there is not rotation in
21 the vertical. There is only rotation about a single
22 axis. Not multiple axes. And then in 82 is only
23 rotation about this single axis, horizontal axis; not
24 multiple. And those were the main determinations, I
25 believe, of the claim construction.

1 So what I was trying to say -- now that
2 you have seen the patent-in-suit and how that works and
3 it has the two different axes, what we are saying, Your
4 Honor, is Paragraph (a) of Claims 1 and 19, you know,
5 that have the camera 12 being rotatable with respect to
6 a first axis of rotation relative to that hinge member
7 74, which I pointed to right here. This hinge member
8 74. And then it has a hole going through it about which
9 the camera rotates around a vertical axis.

10 Now, Figure 4 of the '343 patent drawing,
11 clearly shows that the camera 12 is rotatably mounted on
12 the first vertical axis 26. There is a rotational
13 mounting here.

14 Is rotatably mounted on the first
15 vertical axis. And there is no way, Your Honor, that
16 AdjustaCam can reasonably argue that Sakar's vertical
17 shaft coming out of the bottom of the camera that was --
18 I handed you, Your Honor, the camera part. And there
19 was a shaft and a ball coming out of the bottom.

20 And that shaft was fixedly attached to
21 the bottom of the camera. So there was no rotational
22 movement between the camera that Your Honor was holding
23 and the shaft that was fixed to the bottom of it that
24 had a shaft and a ball there.

25 So the claim requires rotation. There

1 the pin was fixed to the bottom of the camera, so there
2 was no rotation in Sakar's device. From day one there
3 was never any rotation in Sakar's product between the
4 camera and the shaft attached to the bottom, which is
5 what is required -- that is exactly what is required in
6 the claims of the patent-in-suit and in Figure 4 --
7 shown in Figure 4 of the patent-in-suit.

8 Very clearly, Your Honor, the structure
9 in the Sakar camera does not and cannot meet the
10 rotatable hinge 80 having a vertical axis 26 as shown in
11 Figure 4 of the '343 patent. Thus, there is no
12 infringement of Paragraph (a) of Claims 1 and 19 by the
13 Sakar device.

14 Moreover, Your Honor, on
15 cross-examination of their own expert Dr. Muskivitch, I
16 had the following simple exchange with him at Pages 280,
17 308, and 311 of his deposition. That is Dr.
18 Muskivitch's deposition.

19 And, basically, he said that the Kodak
20 camera, which is the Sakar camera, does not rotate
21 relative to the stem and ball. The camera does not
22 rotate relative to the stem and ball which were fixed to
23 the bottom of the camera. And the word "fixed" means
24 they can't rotate it. So they can't rotate relative to
25 each other.

1 He agreed to that in three times -- he
2 agreed to that statement basically three times. And it
3 is attached to our Appendix A in our brief. And I will
4 read you the exact sentence from the deposition, Your
5 Honor, just so you will see what the expert said.

6 The question was: So am I correct -- is
7 it correct to say that the Kodak camera does not rotate
8 relative to the stem and ball because they are fixed to
9 each other?

10 ANSWER: That's correct.

11 And that statement was at Page 280 of his
12 deposition. And basically similar questions were asked
13 on Pages 308 and 311 of Dr. Muskivitch's deposition.

14 So I am submitting to Your Honor that
15 even plaintiff's own expert when he was asked whether or
16 not the Kodak structure rotates in the same manner as
17 shown in the patent-in-suit and as shown in Figure 4, he
18 said, no rotation, there is no rotation. There is no
19 rotation. They are fixed. So, therefore, there is
20 no -- let me just -- oh, okay.

21 Now, I just discussed Paragraph (a) of
22 both Claims 1 and 19, and I explained why there was no
23 infringement because there is no rotation of the Kodak
24 camera base and the shaft that was fixed to it. I just
25 want to quickly address, Your Honor, Paragraph (b) of

1 Claims 1 and 19 of the patent-in-suit.

2 They call for the support frame -- which,
3 Your Honor, I am pointing to the screen. The support
4 frame are these two legs that are connected to the
5 bottom of the camera 12. This is the camera. These two
6 legs make up what is called a support frame 18. Here is
7 the number 18. When you read the patent, they talk
8 about that support frame.

9 And they -- the claims call for the
10 support frame 18 being rotatably attached to the hinge
11 member. Again, this is a different hinge member. I'm
12 going to point to 82. I'm sorry. I'm going to point to
13 82 here. And this hinge member 82 is different from the
14 vertical hinge member that we talked about a moment ago
15 in Paragraph (a) of the claim. This is the vertical
16 hinge. This is the horizontal hinge, which is also
17 shown in Figure 3 as a horizontal hinge in a horizontal
18 direction as compared to the vertical direction.

19 So just to be clear, it is a little bit
20 confusing, let me just say it one more time; that in
21 Paragraph (a) of Claims 1 and 19 they talk about this
22 rotational axis, which has the number 26. And in
23 Paragraph (b) of both claims they talk about this
24 horizontal axis 82 which has a pivot point where I am
25 pointing to now, and it is also shown more clearly in

1 Figure 3.

2 Now, with regard to Paragraph (b) of both
3 of those claims, Your Honor, again, they call for the
4 support frame, which are the legs, being rotatably
5 attached to that hinge and rotating about the second
6 axis of rotation, which is the horizontal axis 82 shown
7 in Figures 3 and 4. With the -- with the rotation being
8 relative to the support frame 18.

9 So this axis 82 allows the support frame
10 and legs to rotate relative to this hinge member, which
11 is, again, a separate hinge member from the vertical.
12 And by claim construction that was determined to be a
13 single -- it can only be a single axis of rotation.

14 However, Kodak's structure actually has
15 two axes of rotation, one in the vertical position and
16 another one in the forward tilt position. And, Your
17 Honor, so there are two axes of rotation in our device.

18 And I know it is an imposition, but would
19 Your Honor mind if I just show you -- come up and show
20 you what I am talking about?

21 THE COURT: All right. This is hard to
22 see on this because you have broken the pivot off?

23 MR. SUTTON: Yes.

24 THE COURT: I can't even see how it
25 attaches to the ball and joint, but you can show me if

1 you want to.

2 MR. SUTTON: I will try and do it, but I
3 recognize that it makes it more difficult.

4 THE COURT: You don't have one that's not
5 broken?

6 MR. SUTTON: To be honest with you, I put
7 it in my suitcase on this trip, and it broke in the
8 suitcase. So I was working with it last night, and I
9 just didn't wrap it up properly. I apologize.

10 MR. SUTTON: What I want to show Your
11 Honor is pretty simple. There is a pin coming out of
12 the bottom of this and a ball that sits in this hole.

13 THE COURT: Right.

14 MR. SUTTON: So when it is sitting on
15 that hole and when I was able to play with it last
16 night --

17 THE COURT: It can rotate along the
18 vertical axis or along the horizontal axis, right?

19 MR. SUTTON: Well, actually what I want
20 to explain here, with regard to Paragraph (b) of the
21 claim you get two -- you get two axes of rotation
22 instead of a single one. And how do you get the two?
23 One is this way. And then you can actually bend it
24 forward. It was called in the deposition the tilt
25 forward position.

1 Then in the tilt forward position you can
2 rotate it about that axis. So you rotate it about a
3 vertical axis and then you tilt it forward and still
4 rotate it about a tilted axis. So it doesn't infringe
5 the Claim B of Claims 1 and 19 because on the claim
6 construction that Claim B, Paragraph (b), of the claims
7 were held to be limited to a single axis of rotation,
8 which was called the second axis of rotation, which is
9 in Figures 3 and 4 is the pivot point 82.

10 But when you look at the Kodak product,
11 it had -- it had -- when it was attached with the ball
12 and socket, it could rotate about a vertical axis, and
13 it could rotate -- when you move it forward it could
14 rotate also. So it had at least two axes of rotation.

15 And Dr. Muskivitch agreed to that as well
16 when we went over it in the deposition, and I am going
17 to refer to the page numbers. Just let me give you
18 that, Your Honor.

19 If you look at Dr. Muskivitch's
20 deposition at Pages 304 and 313, I asked him the
21 following question, and I will just quickly read the
22 question and answer that he gave on Page 313:

23 QUESTION: If there is a vertical axis of
24 rotation and then it is a different axis of rotation in
25 the forward tilt position, that is two axes of rotation,

1 correct?

2 ANSWER: Yes.

3 So, Your Honor, that is attached to our
4 brief as an appendix, and it is a quote from the
5 deposition of Dr. Muskivitch, which is part of the
6 papers that have been submitted to Your Honor.

7 So even the expert of plaintiff agreed
8 when we questioned him on cross-examination that there
9 were two axes of limitation with regard to the
10 limitations of Paragraph (b). And under claim
11 construction, there could only be one axis of rotation.

12 And I submit to Your Honor that this
13 whole exercise that I have been talking for the last
14 five or ten minutes shows that from day one -- well,
15 actually, let me amend that. Not from day one. But our
16 product always worked that way from Claim 1, but the
17 claim construction made it even clearer that the patent
18 could only have a single axis of rotation in the
19 vertical as shown here. There could only be a single
20 axis of rotation. And here there could only be -- and
21 that is a single axis of a vertical rotation and here 82
22 there is only a single axis of rotation.

23 And, again, Sakar never had a rotatable
24 member connected to the bottom of the camera the way the
25 patent does. And it never had -- it always had more

1 than one axis of rotation; whereas, the patent always
2 had a single axis of rotation. So for those reasons, we
3 submit that there was never any infringement.

4 And, Your Honor, as an aside -- and I
5 don't know if I should say this or if it is proper to
6 say this in open court, but I used to be a Patent
7 Examiner; and when I read the three arguments made by
8 the Examiner in Washington and I read the three replies
9 made by the plaintiff to the three rejections, I told
10 Sakar early on that there is no way the Examiner in
11 Washington was going to allow the claims to this patent
12 in the reexamination because of the very points I am
13 talking about; that -- that the Irifune patent, which
14 was prior art was held -- was held to be -- was held to
15 render the claims invalid.

16 And then I also told Sakar that there
17 could never be any infringement because that patent and
18 that structure that I have been repeating and repeating,
19 Your Honor, is single axis of rotation at axis 26, and
20 we don't have that. Sakar's product doesn't have that.

21 And then another axis of rotation, a
22 separate axis of rotation 82, which is the horizontal
23 axis of rotation, which is shown here, we didn't have
24 that.

25 And, Your Honor, I settle cases. I don't

1 litigate that much. I try to settle all my cases. But
2 they asked us for \$800,000 and I could not -- then they
3 dropped down to 200,000, and I said I am not paying
4 anything. You know, I said you are going to be rejected
5 by the Patent Office and your claims are invalid.

6 So Sakar listened to me. Sakar, Fry's,
7 and Kohl's never paid any money, never listened to their
8 demands. Thank God they listened to me, and thank God I
9 was right that the Patent Office did what I thought they
10 were going to do, which is reject all those claims.

11 And then Mr. Edmonds actually dropped the
12 claims. I thought if his position was correct, he would
13 have appealed them; but he didn't bother appealing them.
14 I think, Your Honor, that is very telling when an
15 attorney is prosecuting claims through the Patent Office
16 and, you know, after everybody -- there is only two
17 parties left in the case, he now drops those claims and
18 doesn't appeal them. I think that is very telling. He
19 knew he didn't have a good case.

20 Your Honor, thank you very much.

21 THE COURT: Thank you.

22 Response.

23 MR. EDMONDS: Thank you, Your Honor.

24 We have some materials on the PowerPoint
25 for the Court here. I also added a couple of slides on

1 the fly based upon some things that were said that I
2 think are enlightening as to kind of what is going on
3 here.

4 (Picture shown on PowerPoint.)

5 THE COURT: Who is the girl, is she your
6 girlfriend?

7 MR. EDMONDS: I'm sorry, Your Honor.

8 THE COURT: Is she your girlfriend? Very
9 nice.

10 MR. EDMONDS: Yes. I missed that, Your
11 Honor. Sorry.

12 In the first instance, to put this into
13 context, there is a timetable as to what happened with
14 this case. Obviously the end result was not what the
15 plaintiff had wanted, but that doesn't make this case
16 exceptional. Litigation doesn't always happen the way
17 we want it to.

18 In the first instance, the timeline
19 starts well before AdjustaCam even took assignment to
20 the patent.

21 Back in 2001, late 2001 the original
22 patentee, PAR Technologies licensed the patent to
23 Philips for royalties that were averaged a dollar fifty
24 webcam. Philips, by the way, was -- as it says in the
25 expert report that was on record, was one of the

1 industry leaders.

2 Shortly after that, PAR Technologies
3 licensed to Logitech for 1.25 per webcam. As -- also in
4 the record and in our expert report, Logitech was the
5 industry leader at the time. In fact, it is of record
6 that Logitech is paid over at the time 2.2 million
7 dollars. Now that is well over two-and-a-half pursuant
8 to its license. And, in fact, it still continues to
9 pay.

10 AdjustaCam took assignment of the patent
11 in 2010. The lawsuit was filed.

12 During the course of the lawsuit,
13 AdjustaCam entered into six patent license and
14 settlement agreements that are addressed in our expert
15 report and also in the deposition of our expert, who
16 testified about this under oath. There is also
17 testimony under oath from AdjustaCam's Rule 30(b)(6)
18 designee Mr. Haynes; that the benchmark that AdjustaCam
19 were using for its settlement metric for the defendants
20 was 1.25 to 1.50 per webcam in accordance with the
21 precedence that had been set by the Philips and Logitech
22 licenses.

23 THE COURT: Let me ask you in regard to
24 Philips how much royalty did they recover?

25 MR. SPANGLER: I think ultimately it is

1 somewhere north of 250,000. Philips, subsequent to
2 that, is no longer much of a player in this segment of
3 the webcam industry. It may be because of the fact that
4 Logitech knocked them out.

5 So the settlements -- and essentially
6 what these defendants were buying was a right to sell a
7 certain number of webcams for a certain amount. And it
8 is set forth in the terms of these settlement
9 agreements. I have an example for you.

10 Here.

11 Where this particular one, this is
12 Trippe, paid \$25,000 for an amount not to exceed 16,500
13 webcams. There is a separate provision after that.
14 Then they pay \$1.50 per royalty.

15 So this notion that AdjustaCam's
16 settlement practices or licensing metrics are arbitrary
17 or somehow improper, is just completely incorrect. And
18 the mistake that the defendants make is that they see a
19 settlement of a fairly modest amount, and the reality
20 behind that settlement is that the sales volumes were
21 just fairly modest.

22 And those defendants paid exactly how the
23 process should work. They paid a reasonable royalty
24 based upon their level of infringement, really the
25 opposite of what has been characterized as a shakedown.

1 Further -- so now we have in November
2 4th, 2010 the reexamination proceedings were commenced.
3 And I think the commencement date is significant in the
4 fact that the reexamination lasted almost two years.

5 And something that Counsel For Sakar says
6 is so cut and dry, as the Court is probably aware from
7 its experience with reexamination proceedings, it is
8 never so cut and dry.

9 As a matter of fact, the record shows
10 that the USPTO actually had five different references
11 that it asserted as invalidating.

12 I am going to talk slower, Your Honor. I
13 apologize.

14 The USPTO had five different references
15 it asserted were invalidating. They were Ma, Dovey,
16 Irifune -- has been talked about here -- and Yamauchi.
17 And ultimately all of those references except for
18 Irifune were overcome.

19 And I think that a patentee has the right
20 to contest proceedings in the USPTO, and AdjustaCam
21 certainly succeeded in persuading the USPTO that it
22 erred in many respects in its claim rejections and
23 ultimately fell short with respect to Irifune. But,
24 again, that does not make it an exceptional case.

25 THE COURT: Was the Irifune reference

1 considered by the Patent Office when the initial patent
2 was issued?

3 MR. SPANGLER: It was not. The -- it is
4 also addressed by our expert, which I will get to in a
5 minute. It certainly was addressed in this lawsuit.

6 Following that, as the case proceeds and
7 as this -- as the back-and-forth with the Patent Office
8 proceeds for almost two years, AdjustaCam entered into
9 14 more settlement agreements with various defendants.

10 And the sworn testimony is that the
11 benchmark used for those was, again, the 1.25, 1.50 per
12 webcam for sales.

13 On April 10th, 2012 the Court issued its
14 Markman order. And as what has been pointed out, the
15 Court said that the rotatably attached means that
16 something rotates in a single axis of direction.

17 Further to that and it is sworn evidence
18 of record -- it is not disputed -- AdjustaCam dropped 16
19 webcams from the case. And they were dropped from the
20 case and evidence of record in consultation with its
21 technical expert, an engineer with a PhD; and it
22 reasonably and appropriately narrowed its case in
23 response to the Markman ruling.

24 But the parties still differ as to -- not
25 surprisingly the parties still differed as to

1 infringement even after AdjustaCam had pared down its
2 case.

3 Marching forward to July of 2012. The
4 case is pressed to a fairly advanced state for who is
5 left. AdjustaCam has already issued its infringement
6 report. The defendants -- AdjustaCam has already issued
7 its damages report. Its damages report opines that a
8 reasonable royalty is \$1.25 to \$1.50 per webcam.

9 There is a suggestion by the defendants
10 that AdjustCam somehow, quote, fabricated this \$1.25 to
11 \$1.50 royalty for the purposes of this exceptional case
12 motion.

13 The facts are that AdjustaCam has a very
14 experienced, a very reputable damage expert who gave a
15 very detailed report that is on record with the Court.

16 And it is -- that was the damage expert's
17 opinion in the case, and that was well before anyone
18 made any hint or suggestion that this was an exceptional
19 case or that anybody had done anything frivolous.

20 So this is entirely consistent with
21 AdjustaCam's position throughout the entire case, and it
22 is backed up by the reasoned analysis of its expert.

23 As the case goes on, Gear Head and HP
24 settle. And there has been a --

25 THE COURT: What is your response to

1 their argument about HP's settlement was way out of
2 relation to their revenue?

3 MR. EDMONDS: I have a slide -- well, you
4 know -- in fact, this is one of the slides I added on
5 the fly, Your Honor, because I had not heard that
6 before.

7 I think this is illustrative of the kind
8 of slap-shot approach that has been given to this motion
9 and really how the facts have really been misconstrued
10 by the Court (sic).

11 If you can go to the prior one. Go back.
12 Okay. That is fine. No. No. That is good.

13 I hope you can see this, so AdjustaCam's
14 expert Mr. Bratic initially issue a report and it had --
15 what happened with Newegg was -- excuse me, with HP was,
16 additionally, HP had a significant amount of sales.

17 AdjustaCam along the way licensed some
18 foreign suppliers. And the licenses were made based
19 upon the information provided by those suppliers as to
20 what they thought that their U.S. sales were.

21 And unfortunately for AdjustaCam and
22 really what -- a kink in this case is that after those
23 settlements were made, HP came back and said, oh, by the
24 way, almost every webcam we have sold is covered by a
25 license from a foreign supplier.

1 And so AdjustaCam's damage expert Mr.
2 Bratic had to go in and issue a supplemental report in
3 which he trimmed down his damage number for HP to
4 \$11,000. And HP, as they represented, settled for
5 \$20,000. And the basis of the settlement was that there
6 were \$11,000 in past damages.

7 So this page here is from the
8 supplemental report of Mr. Bratic in which he says
9 because of the Chicony license and the Creative
10 license -- Creative was supplied by another foreign
11 supplier -- I had to go in and readjust my numbers for
12 HP.

13 So HP's numbers were dropped to \$11,000
14 and HP -- and AdjustCam looked at that and said, well,
15 you have \$11,000 in past damages. You are going to be
16 selling a limited number of webcams for the duration of
17 the patent. It goes through 2017, so they came at a
18 number of \$20,000.

19 But the representation of the Court that
20 there were 29 million dollars in HP sales is just flat
21 wrong. In fact, our expert opined \$11,000 of sales with
22 HP. I think it just illustrates how the movants really
23 seem oblivious of the facts here and have really
24 stretched things for the Court.

25 If you go back to the timeline. Thank

1 you.

2 So after HP and Gear Head settle, most of
3 the retailers were now non-issues in the case, most of
4 the remaining retailers; those being BestBuy, Fry's,
5 Micro Center, Office Depot, and Wal-Mart. In other
6 words, their sales were downstream of these
7 manufacturers.

8 The only manufacturer left in the case at
9 that point was Sakar and Newegg, which has a -- almost
10 negligible amount of house-branded webcams.

11 And so AdjustaCam quite reasonably said
12 now that all of the manufacturers have settled out
13 except for Sakar essentially, who had nothing to do with
14 any of these retailers, now they have settled out. Our
15 dispute with you retailers is over. The manufacturers
16 have taken care of it for you. They have settled this
17 dispute for you.

18 So all of those defendants, including
19 Fry's, who Mr. Sutton somehow claims attorneys' fees for
20 who has a dismissal with prejudice with both sides to
21 bear their fees and expenses, again, just a snapshot
22 approach towards this entire proceeding.

23 All of these retailers voluntarily exited
24 the case because their manufacturers had taken care of
25 the issue for them.

1 THE COURT: Now, Fry's was a retailer,
2 wasn't it?

3 MR. EDMONDS: Correct. In other words,
4 once HP and Gear Head had settled -- HP and Gear Head
5 were the last of the manufacturers that were left. So
6 once they had settled these other retailers were out of
7 the case. As the case had proceeded and as you can
8 imagine how a case proceeds against a retailer --

9 THE COURT: Did Sakar supply products to
10 Kohl's and the other one?

11 MR. EDMONDS: Only Kohl's, to my
12 knowledge, only Kohl's. In the damage report that is of
13 record, Kohl's was the only downstream retailer of
14 Sakar's HP webcams.

15 THE COURT: But was the quantity that
16 they had supplied small or large or --

17 MR. EDMONDS: I had the Bratic report
18 handy. I mean, the damage number against Sakar --

19 THE COURT: Excuse me just a minute.

20 MR. EDMONDS: -- was about 200,000 -- oh,
21 I'm sorry, Your Honor.

22 THE COURT: What I am trying to figure
23 out in my mind, Mr. Edmonds, is that you said you had
24 settled with the manufacturers and that took care of the
25 downstream retailers. But Sakar was paying the

1 attorneys' fees for these two downstream retailers
2 supposedly.

3 So my question is, did the settlement of
4 these other manufacturers other than Sakar take care of
5 the two downstream retailers that he was referring to?

6 MR. EDMONDS: They did. I really don't
7 know why Sakar was supposedly indemnifying them. No
8 indemnity agreement was ever produced. And Fry's, for
9 example, had its own counsel.

10 So it is really not clear to me what was
11 going on there. I was surprised when I saw the
12 attorneys' fees invoices that had invoices for other
13 parties.

14 THE COURT: Okay.

15 MR. EDMONDS: I am not sure what was
16 going on in the background.

17 So at this point the sales -- the damages
18 against Newegg at this point with the exit of all of
19 these other manufacturers, the damages against Newegg
20 are \$17,000.

21 And AdjustaCam made a very reasonable
22 decision, strategic decision in the case, to say we
23 don't want to go to trial against a \$17,000 defendant
24 and a much larger defendant, Sakar; Sakar who, by the
25 way, had not designated a damage expert in the case to

1 contest the damage model. Newegg had. They had a
2 damage expert who could contest the damage model Sakar
3 did not.

4 AdjustaCam made a reasonable strategic
5 decision that we want to dismiss Newegg so we can focus
6 our case on Sakar, and we want to go to trial against a
7 defendant who has no damages expert and who we think we
8 have a very good chance of prevailing against.

9 Both of these defendants refused to be
10 dismissed unless they got concessions, which we wouldn't
11 give them. We thought that it was very reasonable what
12 we were doing at the time. Ultimately we filed opposed
13 dismissals under the Super Sack case, which essentially
14 says if you covenant not to sue somebody then the Court
15 loses subject matter jurisdiction.

16 Ultimately, both of these defendants
17 agreed to be dismissed subject to what we are here for
18 today.

19 In the meantime as all this is going on,
20 the -- I am sorry. So Sakar -- AdjustaCam is going to
21 trial against Sakar. That is the way this case is
22 going.

23 Unfortunately, before that could happen,
24 the Patent Office came back after almost two years'
25 proceedings and came back with a final rejection of the

1 claims.

2 So when there is a final rejection of the
3 claims; and as it is of record with the Court, the
4 Patent Office said the asserted claims are -- we deem
5 them valid. But there are a bunch of new and amended
6 claims that you have put them in, and we deem those
7 allowable.

8 AdjustaCam -- and it is here of record,
9 it is in our papers. AdjustaCam had a choice.
10 AdjustaCam could appeal that decision which could
11 potentially take years and which could potentially
12 exhaust the remaining term of the patent, thus being
13 even if victory, a pyrrhic victory because prevailing
14 with the Patent Office at the end of the term of the
15 patent is no victory at all.

16 So AdjustCam again made a very reasonable
17 strategic decision based upon the reality of the
18 situation, that it cancelled the disallowed claims so it
19 could get a reexamination certificate so that if the new
20 and amended claims deemed allowable be allowed.

21 And quite reasonably AdjustaCam went to
22 Sakar and said: It is your lucky day, Sakar. The
23 Patent Office came back. All of the claims have been
24 rejected. We have cancelled them. Our case against you
25 is moot, and we would like to dismiss you.

1 And, of course, they didn't want to be
2 dismissed, and we hear them -- about them complaining
3 about all of these different things.

4 That is the time frame to understand the
5 context of this.

6 Could you go to the next slide?

7 So in terms of why these entities were
8 dismissed, again -- and it is of record and I think the
9 evidence is clear for the Court, Newegg was dismissed
10 because its suppliers culminating in Gear Head and HP
11 had been dismissed; had settled.

12 AdjustaCam, reasonably, wanted to go to
13 trial against Sakar who had significantly higher damages
14 and who had no damage expert to contest the damage
15 model.

16 Unfortunately, after two years of
17 reexamination proceedings in which AdjustaCam was
18 successful by any measure in knocking out most of the
19 references and certainly prevailing on new and amended
20 claims, after two years it faced a hard choice of
21 canceling the rejected claims in order to get its patent
22 back from the Patent Office or potentially exhaust in
23 the patent on appeal. And it made the choice of
24 canceling the claims, and that is why Sakar was
25 dismissed.

1 Sakar wasn't dismissed because there was
2 a flaw in the infringement case. Sakar was not
3 dismissed because we think the patent is invalid. Sakar
4 was dismissed because the claims were cancelled and the
5 only -- really only the most appropriate decision that
6 would be made, given the amount of time left on the
7 patent's life and how long an appeal would take.

8 Looking at the claim -- and we are
9 focusing on this "rotatably attached" element -- the
10 Court -- I think I can try to boil it down with some
11 pictures to give the Court a better perspective on it.

12 To a certain extent we have a battle of
13 the expert. To a certain extent we have Counsel who
14 seem to be representing themselves as an expert testifying
15 unsworn about kind of their opinions of infringement.

16 But to start with, we have the "rotatably
17 attached" element, which is really the only one that is
18 at issue here. And the Court construed "rotatably
19 attached" as: Rotating about a single axis of rotation.

20 And if you look at the pictures of these
21 webcams, and the Court now has -- these are very
22 similar. These are the ones that were left in the case
23 after the case was trimmed down after Markman.

24 And you can see it with the one that you
25 have. There is a channel there that constricts the

1 movement of this appendage to the camera. And the
2 channel is significant because it has to do with the
3 functional limitations upon these devices.

4 Go to the next one.

5 As set forth in the expert report of Mr.
6 Muskivitch and his deposition -- you know, Counsel for
7 Sakar keeps quoting from the deposition of the
8 plaintiff's expert and representing to the Court that is
9 a concession of non-infringement. It just simply isn't.
10 Counsel for Sakar just simply doesn't understand the
11 patent and is just saying things and not really
12 understanding their context.

13 The deposition transcript is of record
14 with the Court, as is the report of Mr. Muskivitch. Mr.
15 Muskivitch maintained -- or Dr. Muskivitch, excuse me,
16 maintained consistently and repeatedly and explained in
17 detail why his infringement analysis was sound, why it
18 was consistent with the Court's construction and why
19 from an engineering perspective and perspective of one
20 of ordinary skill in the art, it was entirely correct.

21 So I think what Counsel is saying
22 interpreting what they are saying is, is that Mr.
23 Muskivitch has said something that we think are a
24 concession of non-infringement; but Dr. Muskivitch never
25 conceded infringement. The suggestion otherwise is just

1 another misrepresentation to the Court.

2 THE COURT: What about doctrine of
3 equivalents?

4 MR. EDMONDS: Well, I think that if there
5 was -- we didn't plead doctrine of equivalents because,
6 frankly, we didn't think we needed doctrine of
7 equivalents. But in terms of if the Court is trying to
8 get its arms around this -- and I will show you in a
9 slide here why, frankly, what we are talking about is
10 just on all-fours with the preferred embodiment.

11 To the extent the Court wants to go
12 there, I think you could certainly say what we say is
13 literal, at a minimum would be equivalent.

14 THE COURT: I'm asking did you allege
15 doctrine of equivalents?

16 MR. EDMONDS: We did not. No. We
17 believe it is a literal infringement case and always
18 have.

19 But this restriction in the movement of
20 the joints, as Dr. Muskivitch has opined and explained
21 in his report and his deposition, results in two
22 functionally independent joints which have range of
23 movement that are independent of each other.

24 An analogy the Court might appreciate,
25 which Dr. Muskivitch, again, explained in his

1 deposition, which is of record with the Court, is that
2 here at my elbow I have two functionally independent
3 joints. And I can twist my arm like this. And that
4 movement is completely independent of the bending of
5 this elbow.

6 I can twist my arm, and I can bend my
7 elbow at whatever twist there is. Or, conversely, I can
8 bend my -- I can twist at whatever bend there is. They
9 are two functionally independent joints. That is from
10 an engineering perspective. That is foundational for
11 Dr. Muskivitch's opinion.

12 Frankly, what we have is a difference of
13 opinion between engineering experts as to whether that
14 is two functionally independent joints. I don't think
15 what Counsel's arguing on that really matters at all. I
16 think what matters for the Court, especially on
17 something as serious as this, is looking at the expert
18 opinions upon which AdjustaCam laid its foundation in
19 terms of a clearly sufficient basis for us to have
20 proceeded with the case.

21 What illustrates the point --

22 The next slide, please.

23 -- is, as you can see, the dramatic
24 similarity between the webcams that were left in the
25 case after the Markman and the preferred embodiment of

1 the -- that is set forth in the patent itself.

2 And as you can see, the preferred
3 embodiment in the patent itself, as Mr. Sutton was
4 saying, it tilts and it pans just like my arm does, my
5 arm example, just like these cameras do.

6 There is a functionally independent joint
7 that can tilt forward within that channel. There is
8 also a functionally independent joint that can pan side
9 to side. It is fundamental to how these cameras are.

10 But we don't read the Court's Markman
11 ruling, and have never read the Court's Markman ruling,
12 and I think it would be improper to read the Court's
13 Markman ruling as excluding not only a preferred
14 embodiment but really the preferred embodiment in this
15 patent.

16 And I think that what we have is that the
17 defendants, at least these two, have misread the Court's
18 claim construction opinion to exclude something that is
19 not excluded at all.

20 And to illustrate the point, this is
21 Figure 2 of the patent. So as you can see, the
22 preferred embodiment webcam, the 48 there where it has
23 the crop lines, is illustrating how the camera tilts and
24 then it also pans at whatever degree of tilt. At
25 whatever axis of tilt that it is tilted at, it also

1 pans. Or conversely however it is panned, it also tilts
2 as well; just like the infringing webcams and just like
3 the opinions of Dr. Muskivitch have set forth.

4 I also want to point out, this is another
5 slide I did on the fly; but it is actually from our
6 response.

7 Again, I think it illustrates how these
8 two defendants are just so fast and loose with the facts
9 with the Court. And I think it is really a disservice
10 to this Court on such a serious motion.

11 And the first representation I heard was
12 from Counsel from Newegg who represented that HP had 29
13 million dollars in implicated sales, which was just
14 demonstratively false.

15 And then, secondly, Counsel for Sakar
16 represented multiple times to the Court that his
17 disassembled webcams -- of which he didn't bring all of
18 the pieces to Court -- have a ball. If you remember he
19 said that many times.

20 That is not a ball. That is a -- a ball
21 is round. And, you know, I just don't understand why
22 the defendants can't be -- have more candor with the
23 Court as to what is really going on here. Dr.
24 Muskivitch went in great detail in his report in
25 explaining these devices, how they move from an

1 engineering perspective and what was going on there.

2 We even have -- even today in this Court
3 we have Counsel who are shading the facts for the Court
4 trying to throw up some smoke here.

5 THE COURT: Counsel, I'm running out of
6 time here.

7 MR. EDMONDS: Yes, Your Honor.

8 THE COURT: So if you can kind of wrap it
9 up, and I will hear very brief rebuttal.

10 MR. EDMONDS: Thank you, Your Honor.

11 THE COURT: I have another matter I have
12 got to get to.

13 MR. EDMONDS: We have also pointed out,
14 and Counsel kind of testified how this was such a
15 cut-and-dry case and he knew from the beginning how we
16 were sunk in the Patent Office and how we'd never
17 infringe.

18 The record is that neither of these
19 defendants disclosed any non-infringement arguments in
20 their interrogatories. Neither of these defendants
21 disclosed any non-infringement -- any factual basis for
22 non-infringement with their 30(b)(6) witnesses.

23 In fact, Newegg's Counsel refused to let
24 its witness even discuss non-infringement. So in a case
25 that is supposedly so cut-and-dry that Counsel knew all

1 along they were going to win, I think it is telling they
2 were playing hide the ball with the plaintiff. And I
3 think it is illustrative that it is not as cut-and-dry
4 as they think.

5 On this validity issue -- if you turn to
6 the next slide, I will speed through this.

7 This discussion of Irifune, and it is set
8 forth in detail in Dr. Muskivitch's validity report,
9 Irifune -- the problem with Irifune and the reason why
10 it falls short as an invalidating reference, is that it
11 has to be rotatably attached.

12 And as Dr. Muskivitch explained in his
13 report, with Irifune it can either be attached or it can
14 be rotatable; but it can't rotatably attached because it
15 has this loose attachment -- or this connection via
16 screw 9.

17 And to understand it, it is because it
18 loosely fits through this passage in this arm 2. It is
19 not attached to it at all when it is not screwed down.
20 And when the camera is screwed down, it doesn't rotate
21 at all.

22 You know, that argument was ultimately
23 unpersuasive with the Patent Office, but it is certainly
24 a good-faith argument. In fact, if the Court will read
25 Dr. Muskivitch's report, I think the argument is

1 compelling.

2 Finally, the last two slides. I already
3 went through about the misstatements of the -- one
4 more -- about the HP license. The criticism of Mr.
5 Bratic's report -- the problem with this criticism of
6 Mr. Bratic's report is the defendants failed to account
7 for the fact that AdjustaCam was not collecting
8 royalties for pre-suit sales because there had been no
9 marking.

10 In fact, during the Court proceedings we
11 readily conceded there had been no marking. So that is
12 a fatal flaw in these inflated estimates they have of
13 why the Bratic report numbers are wrong.

14 They also failed to account for the fact
15 that when some defendants settle, downstream defendants
16 now don't have to pay as much. A good example is HP who
17 because its overseas suppliers settled, got an excellent
18 deal where its sales were diminished to almost nothing.

19 It also includes linear sales projections
20 when their own expert said that sales were dropping
21 dramatically in this industry.

22 Lastly here, as far as the Rule 11
23 violation, again, misstatements about what was said by
24 the 30(b)(6) designee. The 30(b)(6) designee said we
25 depended on our Counsel to do the Rule 11 analysis, and

1 our Counsel did a Rule 11 analysis. The never said a
2 Rule 11 analysis was never done. That is just a
3 misstatement to the Court, and the cites from the
4 deposition are in the record.

5 And they testified that a Rule 11
6 analysis was done. When our Rule 11 analysis was
7 challenged, we put forth sworn proof that we did a
8 proper Rule 11 analysis.

9 No one has said that what is in the
10 declaration does not amount to a proper Rule 11
11 analysis.

12 And then, finally, these analogies to the
13 Eon-Net case are completely misplaced. There has been
14 no shake-down here. The settlement numbers were
15 reasonable. There has been no showing that the
16 infringement case was flawed. There has been no showing
17 that the validity case was flawed.

18 What we have here is we have a case that
19 licensed a large number of defendants based on a very
20 reasonable settlement metric that has the backing of a
21 competent damages expert who made a competent report.

22 We have the infringement theory that has
23 the backing of a competent expert who has a competent
24 report.

25 There has been no showing of any bad

1 faith. There has been no showing of any objective bad
2 faith. There certainly has been no clear and convincing
3 evidence that any bad faith has happened here.

4 Not all cases end with success with the
5 plaintiffs especially when the Patent Office isn't
6 cooperative. But that does not make the case
7 exceptional.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 Response?

11 MR. ZARIAN: Thank you. Briefly, Your
12 Honor. If I may use the Elmo.

13 Your Honor, just a handful of points
14 while we pull that up.

15 First, Your Honor, there is no rational
16 connection whatsoever between the settlements that have
17 been obtained in this case and this litigation and any
18 target royalty rate.

19 I just want to underscore that. We have
20 laid this out in our papers, Your Honor, but the imputed
21 royalties -- and we have undertaken to determine these.
22 The other side has not -- range from ten cents a unit to
23 \$161 per unit.

24 The Hewlett-Packard example is actually
25 instructive. There were 29 million dollars in sales.

1 Plaintiff would excuse a \$25,000 settlement with HP on
2 the strength of two other settlements. And this is at
3 the 150, et seq of Mr. Bratic's deposition.

4 Well, those two other defendants settled,
5 and that presumably included other units, for \$165,000
6 respectively. That covered 98 percent of the units that
7 HP sold and, presumably, other units as well.

8 And yet the 8,000 remaining units were
9 settled ostensibly for 25,000. There is no way to
10 square that. There is no way to reconcile any of those
11 figures to a target royalty range.

12 The only way to reconcile and understand
13 the settlements reached in this case is that they were,
14 in fact, reached by reference to nuisance value and the
15 value that could be extracted in every case through
16 litigation, including those first two settlements with
17 Philips and Logitech which were also in litigation.

18 Secondly, Your Honor, there is no way to
19 get around the fact that the infringement argument in
20 this case was baseless from the outset. We have a
21 ball-and-socket joint -- and this is a printout, but the
22 Court saw the original when it was electronically shown
23 to the Court during plaintiff's presentation.

24 There is a ball-and-socket joint. And
25 the fiction that was adhered to throughout this case

1 relentlessly was that that ball-and-socket joint was
2 really two fundamentally independent joints. That was
3 the only way to try to square the reality of this
4 product with the claims. And it was baseless and
5 frivolous from the start.

6 Page 8, Your Honor, of our brief maybe
7 has a better picture that clearly shows that we have a
8 ball-and-socket joint here. There is no way to argue in
9 good faith that that is something that rotates or causes
10 the camera to rotate about a single axis of rotation.
11 There is no question that was what the claims in this
12 case required.

13 Finally, Your Honor, I won't touch on the
14 invalidity issues which Counsel for Sakar I think
15 covered very well; and those, too, serve to make this
16 case baseless and unmeritorious from the very outset of
17 the litigation.

18 But the last point I want to make, Your
19 Honor, is that the inference is inescapable that
20 plaintiff knew that it had advanced a baseless theory of
21 infringement certainly as to Newegg's cameras.

22 Some of these facts have been covered.
23 But to summarize, there were 16 cameras dropped,
24 apparently, we are told after claim construction. We
25 have never been told exactly which ones those are. But

1 presumably they were ball-and-socket configurations
2 likes ours.

3 We know about the HP settlement. No way
4 to square that with any rational basis or a target
5 royalty rate.

6 The day before the technical expert for
7 the plaintiff is set to be deposed, it is that very
8 day -- the day before, that Newegg is approached about
9 dismissal. And only on that day, again, after experts
10 have been deposed and reports have been placed in
11 evidence, that a new expert report is produced by their
12 technical expert.

13 The timing, again, makes it crystal clear
14 that plaintiff had to know that it was advancing and had
15 been advancing an entirely baseless theory of
16 infringement.

17 And it was only when it became clear that
18 Newegg would put plaintiff to its proof and hold it
19 accountable, that in desperation they first tried to get
20 the case dismissed and then to come up with an entirely
21 novel, entirely novel theory of infringement never
22 before disclosed in this -- on August 24th of 2012.

23 And these circumstances, these facts, and
24 this timing, Your Honor, make it inescapable to conclude
25 and infer that plaintiff had knowledge of the baseless

1 nature of its claims and had that knowledge as to
2 Newegg.

3 And for that reason and for the other
4 reasons that we have reviewed and discussed in our
5 papers, Your Honor, this is an exceptional case; and a
6 fee award under Section 285 is appropriate.

7 THE COURT: All right. Thank you.

8 MR. SUTTON: Your Honor, can I just take
9 one minute?

10 THE COURT: All right.

11 MR. SUTTON: One important thing is, Your
12 Honor --

13 THE COURT: Counsel, go to the podium, if
14 you would, where you can speak into the microphone.

15 MR. SUTTON: Okay. Your Honor, I must
16 contest what Mr. Edmonds said when he said that Sakar
17 was not dismissed because of the Patent Office
18 rejection.

19 I don't know how he can say that to the
20 Court. We were -- as soon as they got their final
21 rejection in September 2012, I wrote him a letter saying
22 we are going to introduce that rejection, final
23 rejection in the evidence at the trial. About a week
24 later he submitted a dismissal with regard -- he wanted
25 to get Sakar out of the case because he had no more

1 case.

2 Also, the other thing I must refute is I
3 would like to hand Your Honor three pages to save Your
4 Honor a lot of time. These are the three simple quotes
5 from Dr. Muskivitch's report. They are Appendix A, B,
6 and C to my brief.

7 Mr. Edmonds has them. I would like to
8 hand them up to Your Honor because one page -- two of
9 the pages show non-infringement by their own expert.
10 And the third page shows Irifune making the patent
11 invalid and his expert is agreeing.

12 If I may, I would like to hand these up
13 to the Court.

14 THE COURT: You may.

15 MR. SUTTON: They are the exact quotes
16 from the depositions.

17 THE COURT: All right. You may hand them
18 up to Ms. King.

19 And let me ask both sides to provide the
20 Court with a copy of your slide presentations that you
21 have provided.

22 Anything further?

23 MR. SPANGLER: Nothing from the
24 plaintiff, Your Honor.

25 THE COURT: From defendants?

1 MR. ZARIAN: No, Your Honor.

2 MR. YARBROUGH: No, Your Honor.

3 THE COURT: All right. Thank you. Be
4 adjourned.

5 (Hearing adjourned.)

6

7 CERTIFICATION

8

9 I HEREBY CERTIFY that the foregoing is a
10 true and correct transcript from the stenographic notes
11 of the proceedings in the above-entitled matter to the
12 best of my ability.

13

14 /s/ Shea Sloan
SHEA SLOAN, CSR, RPR
15 Official Court Reporter
State of Texas No.: 3081
16 Expiration Date: 12/31/14

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